APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-55709
D.C. No. CV-04-08247-AHM

[Filed November 9, 2007]

FRANCIS DENBY GHERINI, individually and as a Successor in Interest to the Estate of Inez Gherini, deceased,	)
Plaintiff-Appellant,	)
v.	)
ROBERT J. LAGOMARSINO; STANLEY T. ALLBRIGHT, individually; EDWARD HABERLIN, individually; COUNTY OF SANTA BARBARA; ROGER M. SULLIVAN; SULLIVAN WORKMAN AND DEE, a Law Firm; JOHN GHERINI, individually and as Executor of the Estate of Pier Gherini, deceased; JOY RYAN, individually; CHARLES CUMMINGS; ANDREA GHERINI GALLNT; CATHERINE GHERINI BEAUCLAIR; THEODORE ENGLAND; DAVID SHEA; DAVID TREDWAY; FERGUSON CASE ORR PATERSON & CUNNINGHAM LLP;	)

MICHAEL R. SMENT; DEAN M. WARD; PAUL FRIMMER; GHERINI FAMILY HOLDINGS LLC; FRED ROSENMUND; OXNARD HOLDING COMPANY; DON L. CARLTON, INC.; STEVEN HINTZ, individually; HENRY WALSH, individually; ARTHUR GILBERT, individually; COHEN ENGLAND & WHITFIELD; MARLA DAILY, individually and as Officer of Santa Cruz Island Foundation, Santa Cruz Island Company and The Nature Conservancy; DEPT. OF ENERGY; UNITED STATES DEPARTMENT OF JUSTICE, DEPARTMENT OF INTERIOR; DIANE ELISTROM DEVINE, individually and as Officer of the Nature Conservancy; FEDERAL ENERGY REGULATORY COMMISSION, Department of Energy; TOM GHERINI, individually and as Executor of the Estate of Pier Gherini; NATIONAL PARK SERVICE; STATE OF CALIFORNIA; THE NATURE CONSERVANCY; VENTURA COUNTY SUPERIOR COURT; WILLIAM H. EHORN, individually and as Office (NPS); ANDREA SEASTRAND, individually and as member of California State of Assembly (1990-1994) and United States Congresswoman (1995-1997); TIM SETNEKA, individually and as Official (NPS); UNITED STATES OF AMERICA; SUPERVISING CLERK, FISCAL DEPARTMENT U.S. DISTRICT COURT,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted November 5, 2007
Pasadena, California

Before: B. FLETCHER, REINHARDT, and RYMER, Circuit Judges.

MEMORANDUM*

Francis Denby Gherini appeals the district court's dismissal of his action pursuant to Fed. R. Civ. P. 12(b)(6). We affirm.

The district court dismissed Gherini's action with prejudice on the ground that it lacked subject matter jurisdiction due to the "probate exception" to federal jurisdiction. Following the Supreme Court's subsequent decision in *Marshall v. Marshall,* 547 U.S. 293 (2006), however, that ground is no longer valid. Gherini's first amended complaint asserts RICO and tort claims and seeks an *in personam* damages judgment against the defendants themselves; it does not seek to administer an estate, probate a will, or otherwise assume *in rem* jurisdiction over property in the custody of a state probate court. Therefore, the probate exception does not deprive the district court of subject matter jurisdiction over Gherini's claims. *See Marshall,* 547 U.S. at 311-12.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Nevertheless, we may affirm the district court's grant of a motion to dismiss on any ground supported by the record. *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir. 2006). We hold that the district court lacks jurisdiction over Gherini's RICO claim for two reasons. First, Gherini does not have standing to bring his RICO challenge. Because he never had a property interest in the Gherini Ranch, Gherini was not "injured in *his* business or property by reason of a [RICO] violation." 18 U.S.C. § 1964(c) (emphasis added). Second, because Gherini alleged no injury to his own business or property, his RICO claim is insubstantial. *See Markham v. United States*, 434 F.3d 1185, 1188 (9th Cir. 2006).

Because the district court lacks subject matter jurisdiction over Gherini's federal claim, it has no discretion to exercise supplemental jurisdiction over Gherini's remaining state-law claims. *See Skysign Int'l, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1118 n.7 (9th Cir. 2002) ("[H]ad Skysign lacked standing to bring its federal claim, the district court would have lacked subject matter jurisdiction over that claim and accordingly would have had no discretion to hear the state law claims."); *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995) (noting that supplemental jurisdiction exists only "when the federal claim is sufficiently substantial to confer federal jurisdiction," and that an insubstantial federal claim "divest[s] the court of [supplemental] jurisdiction"); *see also* 28 U.S.C. § 1367(c)(3) (giving district courts discretion to decline to exercise supplemental jurisdiction where "the district court has dismissed all claims *over which it has original jurisdiction*") (emphasis added).

Accordingly, the district court's dismissal of Gherini's action is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55709
D.C. No. CV-04-08247-AHM

[Filed November 9, 2007]

FRANCIS DENBY GHERINI, individually and as a Successor in Interest to the Estate of Inez Gherini, deceased,	)
Plaintiff-Appellant,	)
v.	)
ROBERT J. LAGOMARSINO; et al.,	)
Defendants-Appellees.	)

JUDGMENT

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Recrod from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered Friday, November 9, 2007

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 04-8247 AHM (SHx)

[Filed April 13, 2005]

Francis Denby Gherini, individually, and as Successor in Interest to Estate of Inez Geherini, deceased	)
Plaintiff	)
v.	)
Robert J. Lagomarsino, individually and as California State Senator (1961-1974) and United States Congressman (1974-1992); Andrea Seastrand individually, and as a member California State Assembly (1990-1994) and United States Congresswoman (1995-1997); The United States; Department of Interior; Department of Justice; Department of Energy; National Park Service (NPS); State of California; County of Santa Barbara; Ventura County Superior Court; William H. Ehorn, individually and as official (NPS); Tim Setneka, individually, and as official (NPS) Stanley T. Albright, individually and as	)

official (NPS); Edward Haberlin,)
individually, and as official (NPS); Joy Ryan,)
individually, and as United States Attorney)
Department of Justice; Doe 1, individually,)
and as Clerk, United States District Court;)
Federal Energy Regulatory Commission;)
Department of Energy; Steven Hintz,)
individually, and as Judge Ventura County)
District Court of Appeal, Second District;)
The Nature Conservancy, a corporation;)
Diane Elistrom Devine, individually, and as)
officer of The Nature Conservancy; Marla)
Daily, individually, and as officer Santa)
Cruz Island Foundation, Santa Cruz Island)
Company, and The Nature Conservancy;)
John Gherini, individually and as officer,)
Santa Cruz Island Company, a Corporation;)
Tom Gherini, individually, and as executor)
of Estate of Pier Gherini; Roger M. Sullivan,)
individually and as partner Sullivan,)
Workman & Dee; Charles Cummings,)
individually and as partner in Sullivan,)
Workman & Dee Sullivan Workman & Dee;)
Andrea Gherini Gallant, individually, and as)
attorney, Sullivan, Workman & Dee;)
Catherine Gherini Beauclair; Theodore)
(Ted) England, individually, and as partner,)
Chohen, England and Whitfield; David)
Shea, individually, and as partner, Ferguson)
Case, Orr, Paterson & Cunningham, LLP;)
David Tredway, individually, and as partner,)
Ferguson, Case, Orr, Patterson &)
Cunningham, LLP; Michael Sment; Dean M.)
Ward; Paul Frimmer; Gherini Family)
Holdings, LLC; Fred Rosenmud, individually)

and as officer, Oxnard Holding Co., Inc.;)
Oxnard Holding Company Inc.; Don L.)
Carlton, Inc; Does 2-10)
)
Defendants)
)

Proposed Judgment of Dismissal of All Claims, All Defendants And The Action With Prejudice

To Plaintiff and to his Attorney of Record:

You will please take notice that pursuant to the Orders dismissing all claims and all defendants with prejudice entered by this Court on March 21, 2005, the Court herein now enters a Judgment of Dismissal of all claims, all defendants and the action, with prejudice.

DATED: April 13, 2005

/s/
UNITED STATES DISTRICT JUDGE

Presented by:

DEBRA W.YANG
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ Sara R. Robinson
SARA R. ROBINSON
Assistant United States Attorney

Attorneys for Defendants
Lagomarsino, Clark, Allbright,
Haberlin and Ryan

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 04-8247 AHM (SHx)

Date March 21, 2005

Title *FRANCIS DENBY GHERINI v. ROBERT J. LAGOMARSINO, et al.*

Present: The Honorable A. Howard Matz, U.S. District Judge

Stephen Montes	N/A	N/A
Deputy Clerk	Court Reporter /Recorder	Tape No.

Attorneys NOT Present for Plaintiffs:

Attorneys NOT Present for Defendants:

Proceedings: (IN CHAMBERS)

Introduction

This matter is before the Court on six separate, but largely overlapping, motions to dismiss.[1] Plaintiff, Francis Denby Gherini ("Denby," "Denny," or "plaintiff"), has submitted a sprawling, confusing, and sometimes inconsistent fifty-two page first amended complaint ("FAC") against forty-two defendants, including members of his immediate family, former members of Congress, various federal officials and agencies, and several attorneys (some of whom formerly represented plaintiff). Plaintiff attempts to allege three causes of action, each against all defendants: (1) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO), 18 U.S.C.

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[1] Two additional motions to dismiss are on calendar for April 4, 2005, and April 11, 2005.

§§ 1962(a)-(d);[2] (2) tortious interference with the right to inherit;[3] and a common count.

The Court dismisses this action with prejudice, for lack of subject matter jurisdiction.

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[2] In his first cause of action, FAC ¶¶ 13-66, plaintiff refers to § 1962 (the RICO claim); the Civil Rights Act of 1964,42 U.S.C. § 1983; and 15 U.S.C. § 1503 (omitted pursuant to §2(b)(2) of Reorg. Plan No. 3 of 1979,44 F.R. 69273, 93 Stat. 1381, set out in the Appendix to Title 5, Government Organization and Employees). This cause of action was pled in violation of Federal Rule of Civil Procedure 8(a), which requires a short and plain statement of the grounds on which the court has jurisdiction and a short and plain statement of the claim showing that the plaintiff is entitled to relief. Although this cause of action purports to raise claims under three federal statutes (one of which is defunct), the Court will construe this cause of action as it is framed by plaintiff's prayer for relief, FAC at 52, as one brought pursuant to RICO.

[3] California courts have not recognized a cause of action for tortious interference with an expected inheritance or gift. *See Hagen v. Hickenbottom*, 41 Cal.App.4th 168, 173 (Cal.App. 1995) (noting, in *dicta*, that intentional interference with an expected gift or inheritance has not been "validated" in California). *In re Estate of Legeas*, 210 Cal.App.3d 385 (1989), which suggested otherwise, was ordered depublished.

Plaintiff's Claims and Argument

In his opposition[4] plaintiff attempts to summarize the "central gist" of his FAC. He writes,

> The central gist of the first amended complaint, is the serious allegation, the United States, through its departments and agents, with the private defendants embezzled, and extorded [sic], in violation of RICO and the US Constitution, almost the entire oil reserves of the Santa Barbara/Ventura geologic oil basin, and surrounding three mile offshore limits of not just the Channel Islands, but the Continental coast, containing the sandy Miocene level access to most major reservoirs. The United States, then sells the oil and gas supplies through so-called federal off-shore leases to the major oil companies, for hugh [sic] profits .... completely defeating the land and off-shore property rights of both the land owners, and the entire citizenry of California, without paying for them.... *[O]n the death of [plaintiff's] parents, a pro-rata share of these oil rights would have passed through the estate of Inez Gherini, his mother, to the Plaintiff, had they not been controlled by and diverted to the United States, by the predicate acts listed in the FAC....* As a result, Plaintiff has both standing and

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[4] In lieu of filing six distinct oppositions, plaintiff filed a single fifteen-page "consolidated memorandum in opposition to all six defense motions to dismiss." The memorandum fails to address most of the arguments raised by defendants.

> direct causative loss of property worth over $550,000,000.00 diverted by the predicate acts to and acquired by the United states [sic].

Opp'n at 3-5 (emphasis added). Plaintiff is mistaken; his complaint, while superficially alleging a RICO claim, is simply another attempt to undermine determinations already made by the California Superior Court, Ventura County (the probate court).

Plaintiff's FAC, replete with references to probate proceedings, reveals the true nature of his claim. In his own words, plaintiff brings this action as "heir, Beneficiary, and successor In Interest to the Estate of Inez Denby Gherini, deceased." FAC ¶¶ 4 & 14.[5] According to plaintiff, the following events and facts frame his action: On December 3, 1996, plaintiff's father, Francis, recorded a gift deed of one-percent of undivided interest in the Gherini Ranch to the Santa Cruz Island Foundation reserving a nonexclusive easement in gross to himself and his heirs. *Id.* ¶¶ 30,

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[5] Plaintiff's immediate family, central to his allegations, consists of Inez Denby Gherini (mother, deceased), Francis Ambrose Gherini (father, deceased), Andrea Gherini Gallant (sister), and Catherine Gherini Gallant (sister). (It appears that Catherine's name is actually Catherine Gherini Beauclair. *See* Request for Judicial Notice, Ex. I at 2.)

32, & 37.[6] Plaintiff's mother, Inez, held a community property interest in the portion of the Gherini Ranch held by Francis. *Id.* ¶ 35. Inez and Francis created the 1989 Gherini Family Revocable Trust (*"Gherini 1989 Trust"*) and individual wills that "poured over" into the *Gherini 1989 Trust*. *Id.* ¶ 39. Under the terms of the *Gherini 1989 Trust*, plaintiff's share was to pass to him in trust, whereas his sister's shares passed to them outright. *Id.*[7] On May 21, 1991, Francis, despite his wife's community property interest in the ranch and without his wife's knowledge, conveyed his interest in the ranch into a 1990 Separate Property Trust (*"Francis Gherini 1990 Trust"*). *Id.* 36 & 39. (Francis allegedly amended the *Francis Gherini 1990 Trust* in order to make Inez, Andrea, and Catherine co-trustees. *Id.* ¶ 39.)

Sometime before Francis's death in 1999, Inez created a "holographic will" the purpose of which was to leave her community property (*i.e.*, all the property not otherwise held in trust) to her children,

> including [plaintiff], *outright of any trust* . . . . The effect was to eliminate any trusts, and with

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[6] The former Gherini Ranch occupied 6,200 acres of Santa Cruz Island (ten-percent of the island). Francis retained a twenty-five percent interest in the ranch until February 10, 1997, when the United States acquired this interest pursuant to a legislative taking. FAC ¶¶ 15, 29, 34.

[7] The FAC also mentions a postnuptial agreement, between Inez and Francis, that affirmed the community property status of the Gherini Ranch and all of the elder-Gherini's property. FAC ¶¶ 39, 40.

> the entire estate agreed to be community property under the postnuptial agreement], when Francis died, his share passed to . . . Inez[,] . . . and *when Inez [died] . . . the entire estate passed under her holographic will, one third to [plaintiff] outright.* The[] reported estate was valued at 18 million dollars, and upon recovery of other assets including, most importantly, the oil and mineral rights one third of which were valued over half a billion dollars, *[leaving Plaintiff] with a reasonably expected outright inheritance, [sic] of over five hundred fifty million dollars* . . . .

Id. ¶ 39 (emphasis added).

Francis Gherini's interest in the Gherini Ranch was terminated pursuant to a legislative taking on or about February 10, 1997. *Id.* ¶ 34. The issue of just compensation for that taking was litigated in federal court and eventually submitted to a jury. *Id.* ¶ 38. (Plaintiff refers to this as the "condemnation proceeding.") Andrea Gherini Gallant and Roger M. Sullivan (of the law firm Sullivan Workman & Dee) were, among others, counsel for the defendants in that action. *Id.* ¶ 34. On February 5, 1999, a jury awarded Francis $12,783,418.00 as just compensation. *Id.* ¶ 40. On April 28, 1999, before this sum was paid, Francis died. *Id.* ¶ 41. At some point thereafter, the parties to the condemnation proceeding stipulated to dismissal of an appeal filed by the United States and to a settlement for the full amount of the jury award. *Id.* The amount was transferred into a trust account of Sullivan Workman & Dee and the law firm extracted legal fees and costs from that account. *Id.* According to

plaintiff, this transfer of the settlement award into the law firm's trust account should never have occurred and was accomplished because Andrea concealed Inez's holographic will and the postnuptial agreement (the two instruments that plaintiff contends removed all of the settlement proceeds out of trust). *Id.* ¶ 44. Plaintiff alleges that, "*By reason of his lost inheritance*, [he] has been damages [sic] in a sum in excess of one billion dollars . . . ." *Id.*

After Inez's death, Catherine petitioned the California Superior Court for a determination of whether the filing of a petition to be appointed trustee in both trusts would violate the "no contest" provisions of those trusts. *Id.* ¶ 46. The court determined that it would, but that Catherine was already a co-trustee of the *Francis Gherini 1990 Trust*. *Id.* Plaintiff then filed a number of petitions in California Superior Court, including a petition to probate Inez's holographic will, requests for accountings of the various trusts, and a request for inclusion of the oil and mineral rights of the Gherini Ranch in the *Francis Denby Trust*. *Id.* ¶ 47. The last petition, for the inclusion of the oil and mineral rights, was removed to federal court. *Id.* During the pendency of this removed claim, plaintiff's counsel, Michael Sment, was discharged and replaced by one Dean M. Ward. *Id.* ¶¶ 47 & 49. Ward stipulated to remand the removed claim and obtained plaintiff's signature to that end. *Id.* ¶ 50. (Upon remand Ward advised plaintiff that the issue of the inclusion of the mineral rights could only be raised in a fraud action seeking to set aside the condemnation award, but that plaintiff was barred from doing so by the statute of limitations. *Id.* ¶¶ 49 & 50.)

On August 14, 2001, Ralph E. McCarthy (plaintiff's counsel in this action) appeared in "Ventura County Superior Court, Probate Department," on the hearing for the abovementioned petitions. *Id.* ¶ 51. The judge denied each without prejudice. *Id.* McCarthy then filed a civil suit for "Tortuous [sic] Interference With Inheritance" and a petition, in probate court, for removal of trustee and accounting. *Id.* The civil action was dismissed for lack of subject matter jurisdiction, and transferred to the probate court with leave to amend as to certain attorneys named as parties. *Id.* Plaintiff's attempt to amend his probate petition with the claims from his civil action was denied and the issue of accounting and removal of trustee was the subject of a thirty-two day trial. *Id.* ¶ 52. The FAC refers to some other state court rulings in allegations that are incomprehensible. It goes on to allege as well that at some point there was an appeal that led to an "outrageous ruling . . . the net result of the Courts [sic] desires to maintain *exclusive jurisdiction* over probate matters, with no jury trial of probate attorneys." *Id.* ¶ 53 (emphasis added).

Plaintiff contends that these extensive court proceedings were part and parcel of a RICO violation the purpose and result of which was to deprive plaintiff of his "lost inheritance," *id.* ¶ 54, and that "[h]is sisters should be estopped by reason of their wrongful and criminal acts from claiming any portion of the estate, and should be ordered to restore and disgorge all assets of the estate they have received." *Id.* ¶ 55. *See also id.* ¶¶ 67-69 (claim for tortious interference with right to inherit).

Judicial Notice of Prior Actions

A. *Gherini v. Gallant, et al.*, CN 214669: On December 13, 2002, plaintiff filed a first amended complaint in California Superior Court, Ventura County. Request for Judicial Notice, Ex. D at 1. That complaint alleged tortious interference with right to inherit, "statutory violations," and a common count, and sought a constructive trust. The complaint named Andrea Gherini Gallant; Ted England; David Shea; Ferguson, Case, Orr, Patterson & Cunningham LLP; Fred Rosenmund; Oxnard Holding Company, Inc.; and Don Carlton, Don L. Carlton, Inc., all defendants in the present action, as defendants. That action was based on plaintiff's contention that pursuant to the *Gherini 1989 Trust* (and amendments), the individual wills of Francis and Inez, the *Francis Gherini 1990 Trust* (and amendments), a letter regarding the status of the elder Gherini's community property, and Inez's holographic will, "[plaintiff] has a clear inheritance expectancy . . . of at least one third of all assets of his parents estate, including the Gherini Ranch. . . ." *Id.* ¶¶ 8-9. The harm alleged was tortious interference with plaintiff's right to inherit. *Id.* ¶ 10. On February 13, 2003, Judge Henry J. Walsh held a hearing on demurrers filed by each defendant. *Id.*, Ex. G at 1. The court sustained the demurrers of Andrea Gherini Gallant, Don Carlton, and Don Carlton Inc., for lack of subject matter jurisdiction, and sustained the demurrers of England, Shea, and Ferguson, Case, Orr, Patterson & Cunningham LLP, Fred Rosenmund and Oxnard Holding Company, Inc. with leave to amend. *Id.* at 2.

The Court of Appeal of the State of California affirmed the Superior Court's entry of judgment in favor of the defendants following the Superior Court's ruling on defendants' demurrers to the first amended complaint. *Gherini v. Carlton*, 2004 WL 901914, *1 (Cal.Ct.App. 2004); Request for Judicial Notice, Ex. K at 2. The Court of Appeal held that, "Denny has petitioned in probate court to dissolve the Denny Trust, remove Andrea as Trustee, remove certain property from the Trust, and admit the holographic will . . . . The probate court has *exclusive jurisdiction* of these matters and Denny has *chosen* to litigate there." *Gherini*, 2004 WL 901914, *5. The court found that the Superior Court had not abused its discretion by sustaining the demurrer of defendant Rosemund to plaintiff's second amended complaint. *Id.* at *4.

B. *In re Gherini Trust*, 1999, P074417:[8] On August 03, 2004, Judge Steven Hintz, on a matter before the Probate Division of the Superior Court of California, Ventura County, issued a statement of decision in the matter of *In re Gherini Trust*. Request for Judicial Notice, Ex. I at 1. The decision addressed and rejected plaintiff's challenges to the accountings of the *Gherini 1989 Trust*, the *Francis Gherini 1990 Trust*, and the *Francis Denby Gherini Trust* (all presented to the court by Andrea Gherini Gallant as trustee), and plaintiff's petition for removal of Andrea as trustee. That decision, an admirable canvassing of

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[8] On December 3, 2004, this court issued a minute order remanding plaintiff's removal of his own state court action, *In re Gherini Trust*, Case No. P 074417, to the California Superior Court, Ventura County.

the incredible events plaintiff purported to describe in the FAC, construed the following instruments: the *Gherini 1989 Trust* (and amendments); the "pour over" wills of Inez and Francis Gherini;[9] the *Francis Gherini 1990 Trust*; Inez Gherini's "Holographic Document;" and the Francis Denby Gherini Trust.

The probate court made, *inter alia*, the following determinations: (1) "Inez's holographic [w]ill neither revoked nor modified the *Gherini 1989 Trust*[,]" *id.* at 9; (2) under the *Gherini 1989 Trust* and Inez's pour over will, "Inez intended Denny's share . . . to be held in Trust for his lifetime benefit, remainder to Denny's three children[,]" *id.* at 4; (3) the federal condemnation proceeds were "Francis'[s] separate property, subject to administration under the *Francis Gherini 1990 Trust*" and "could not properly be dealt with outside of the *Francis Gherini 1990 Trust*[,]" *id.* at 16-17; (4) "there was no proved fraud or defect in the creation and administration of the *Gherini 1989 Trust*[,]" *id.* at 10; (5) "the allegations of fraud, embezzlement, and other criminal misconduct by Andrea Gherini [Gallant], David Shea, Ted England and others was unsupported by any significant evidence . . . ." *id.*; (6) "there was no proved fraud or defect in the creation

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[9] The court noted that these wills were never put into probate by Andrea Gherini Gallant because "substantially all of the assets were held in Trusts and distributed under the terms and conditions of the respective Trusts. Those amounts not held in Trusts were transferred to Denny. . . directly, pursuant to the procedure set forth in Probate Code § 13100. It was not legally necessary to open a probate for either Francis or Inez since all the assets were held in trust or given outright to Denny." Request for Judicial Notice, Ex. I at 5.

and administration of the *Francis Gherini 1990 Trust*[,]; *id.* at 20; (7) "the handling of the condemnation case immediately after the death of Francis Gherini was neither fraudulent nor detrimental to the financial best interests of Denny[,]" *id.*; and (8) "the payment of fees out of the recovery in the condemnation was appropriate and, in fact, required[.]" *Id.*

The court further noted that the estate plan created by Francis and Inez was rife with potential conflict (a conflict that has now found its way before this Court),

> [t]hat is[,] both Andrea and Catherine were to receive their share outright and *Denny's share was to remain in Trust* for the remainder of his life. Certainly, Denny made no secret that *he wants his share distributed outright and not held in Trust*. His desire to obtain his share fee of Trust is in direct conflict with Francis and Inez's intent.

Id. at 24 (emphasis added). This desire of plaintiff to obtain his inheritance outright is part of the essential relief plaintiff seeks before this court.

The Court Lacks Jurisdiction

The Court finds that it does not have subject matter jurisdiction pursuant to the well-established probate exception to federal jurisdiction. *See* Schwarzer, Tashirna, & Wagstaffe, Cal. Pract. Guide: Fed. Civil. Proc. Before Trial 2B-4 § 2:103.15 (The Rutter Group 2005). In *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004), the Court of Appeals was faced with

conflicting judgments of the Texas Probate Court, the United States Bankruptcy Court, and the United States District Court, "that decide[d] the claim of the surviving spouse [of decedent J. Howard Marshall II] and that affect[ed] the distribution of the net property of the decedent's trust and probate estate." *In re Marshall*, 392 F.3d at 1121. The court held that "all federal courts, including bankruptcy courts, are bound by the probate exception to federal court jurisdiction, and that [federal courts] are required to refrain from deciding state law probate matters, *no matter how the issue is framed by the parties*." *Id.* (emphasis added).

The probate exception to federal court jurisdiction provides,

> that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States[.]

In re Sutton v. English, 246 U.S. 199, 205 (1918). However, "[a] federal court 'may entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims *so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in*

custody of the state court.'" *In re Marshall*, 392 F.3d at 1131 (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946) (internal quotation marks omitted and emphasis added)).

In *In re Marshall*, the Ninth Circuit adopted the analysis employed by the Second Circuit in *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002). *Id.* at 1132. The *Moser* analysis is a two-prong inquiry. The first prong, not relevant here, asks "whether the matter is purely probate in nature, in that the federal court is being asked directly to probate a will or administer an estate." *Id.* at 1133. The second prong, itself a three part inquiry, asks "whether the matter is probate-related by determining whether, by exercising jurisdiction over the matter, the federal court would: (1) interfere with the probate proceedings; (2) assume general jurisdiction of the probate; or (3) assume control over the property in custody of the state court." *Id.* "If the answer to any of these questions is yes, then the probate exception applies." *Id.*

"[T]he probate exception encompasses . . . questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument . . . . includ[ing] *fraud, undue influence upon a testator, and tortious inteference with the testator's intent.*" *Id.* at 1133 (emphasis added). The probate exception is applicable to wills and "to trusts that direct a post mortem disposition of the trustor's property." *Id.* at 1135.

Application of the *Moser* analysis to this case confirms that this Court does not have subject matter jurisdiction over this action. Plaintiff's claims turn on

the contention that (1) the entire Gherini estate, including Francis's interest in proceeds of the federal condemnation proceeding (which passed to the *Francis Gherini 1990 Trust*) was held as community property by the elder Gherinis, (2) Inez's holographic will eliminated any standing trusts, including the *Gherini 1989 Trust* and the *Francis Gherini 1990 Trust*, and (3) Inez's holographic will passed one-third of her estate outright to plaintiff. FAC ¶ 39. These claims, and others, have been addressed by the probate court. An exercise of jurisdiction by this court over this matter would clearly interfere with probate proceedings. Plaintiff cannot re-litigate the claims, claims he raised before the probate court in this court. *See In re Marshall*, 392 F.3d at 1135.

Further, in *In re Marshall*, the court noted, "'Where a state has relegated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters.'" *Id.* at 1136. Here, California Probate Code § 17000 provides the superior court "having jurisdiction over [a] trust . . . with *exclusive jurisdiction* of the proceedings concerning the internal affairs of trusts." Cal. Prob. Code § 17000 (West's Ann. 2003). Under § 17200, the internal affairs of the trust include: determining questions of the construction of a trust instrument, determining the validity of a trust provision, settling the accounts and passing on acts of the trustee, and appointing or removing a trustee. Cal. Prob. Code § 17200(b)(1), (3), (5), & (10) (West's Ann. 2003). Thus, insofar as the probate court's proceedings relate to the internal affairs of the trust, that court has exclusive

jurisdiction over those matters, and any assumption of jurisdiction by this court, as to those matters, would constitute an assumption of the general jurisdiction of the probate. *In re Marshall*, 392 F.3d at 1136-37.

Lastly, although plaintiff's opposition purportedly responded to "all defense contentions in one document," Opp'n at 3, the opposition does not address *In re Marshall* or the probate exception, both of which were clearly raised by the pending motions to dismiss.[10] The Court takes this omission as an implicit admission that plaintiff has no substantive response to the argument that the court lacks subject matter jurisdiction.

Conclusion

The discussion above leads the Court to one simple conclusion; this Court lacks subject matter jurisdiction over plaintiff's action. The relief plaintiff seeks, as laid out in the FAC, cannot be granted without interfering with matters either already settled in probate court or exclusively within the probate court jurisdiction. *See Sunon v. English*, 246 U.S. 199, 205 (1918). The Court GRANTS WITH PREJUDICE each of the six motions on calendar for today, March 21, 2005, and the two pending motions to dismiss.[11]

_____:_____

Initials of Preparer /s/_____

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[10] *See, e.g.*, Andrea Gherini Gallant and Don L. Carlton, Inc.'s Motion to Dismiss at 15-17.

[11] Docket Nos. 22, 29, 32, 33, 36, 46, 50, 54.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55709
D.C. No. CV-04-08247-AHM

[Filed December 21, 2007]

FRANCIS DENBY GHERINI, individually and as a Successor in Interest to the Estate of Inez Gherini, deceased,

Plaintiff-Appellant,

v.

ROBERT J. LAGOMARSINO; STANLEY T. ALLBRIGHT, individually; EDWARD HABERLIN, individually; COUNTY OF SANTA BARBARA; ROGER M. SULLIVAN; SULLIVAN WORKMAN AND DEE, a Law Firm; JOHN GHERINI, individually and as Executor of the Estate of Pier Gherini, deceased; JOY RYAN, individually; CHARLES CUMMINGS; ANDREA GHERINI GALLNT; CATHERINE GHERINI BEAUCLAIR; THEODORE ENGLAND; DAVID SHEA; DAVID TREDWAY; FERGUSON CASE ORR PATERSON & CUNNINGHAM LLP;

MICHAEL R. SMENT; DEAN M. WARD; PAUL FRIMMER; GHERINI FAMILY HOLDINGS LLC; FRED ROSENMUND; OXNARD HOLDING COMPANY; DON L. CARLTON, INC.; STEVEN HINTZ, individually; HENRY WALSH, individually; ARTHUR GILBERT, individually; COHEN ENGLAND & WHITFIELD; MARLA DAILY, individually and as Officer of Santa Cruz Island Foundation, Santa Cruz Island Company and The Nature Conservancy; DEPT. OF ENERGY; UNITED STATES DEPARTMENT OF JUSTICE, DEPARTMENT OF INTERIOR; DIANE ELISTROM DEVINE, individually and as Officer of the Nature Conservancy; FEDERAL ENERGY REGULATORY COMMISSION, Department of Energy; TOM GHERINI, individually and as Executor of the Estate of Pier Gherini; NATIONAL PARK SERVICE; STATE OF CALIFORNIA; THE NATURE CONSERVANCY; VENTURA COUNTY SUPERIOR COURT; WILLIAM H. EHORN, individually and as Office (NPS); ANDREA SEASTRAND, individually and as member of California State of Assembly (1990-1994) and United States Congresswoman (1995-1997); TIM SETNEKA, individually and as Official (NPS); UNITED STATES OF AMERICA; SUPERVISING CLERK, FISCAL DEPARTMENT U.S. DISTRICT COURT,

Defendants-Appellees.

Before: B. FLETCHER, REINHARDT, and RYMER, Circuit Judges.

Judge Reinhardt and Judge Rymer have voted to deny the petition for rehearing en banc and Judge B. Fletcher has recommended against rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.